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No. 191

In the Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES, APPELLANT

v.

KATE B. GOLDEN AND E. FIELD GOLDEN, JR., EXECUTORS OF THE ESTATE OF EDWARD T. GOLDEN, DECEASED

APPEAL FROM THE COURT OF CLAIMS

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APPEALS FROM THE COURT OF CLAIMS

XIII. STATEMENT AS TO JURISDICTION

(Filed June 19, 1940)

In compliance with Rule 12 of the Supreme Court of the United States, the United States herewith submits its statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this case. The judgment sought to be reviewed is dated April 1, 1940.

The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Private Act No. 69 of

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April 18, 1934, 48 Stat. 1322, which provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward G. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: *Provided,* That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: *Provided further,* That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid.

The act in question, which provides "that either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof," clearly confers the right of direct appeal. Moreover, the legislative history of the act in question indicated that such language was not inadvertently used for the purpose of authorizing the ordinary review by writ of certiorari.[1]

A bill conferring jurisdiction upon the Court of Claims to hear and determine the claim of Goltra, H. R. 6425, 72d Congress, was introduced in the House with the provision that either party "may appeal to the Supreme Court of the United States." The bill was amended by the Judiciary Committee which inserted after the word "appeal" the words "as of right."[2] H. Rept. 1426, 72d Cong., 1st Session. No action was taken on that bill. In the 73d Congress, an identical bill (H. R. 4398) was introduced to confer jurisdiction upon the Court of Claims to pass upon Goltra's claim. This bill was accompanied by House Report 828, 73d Congress, which contained in full House Report 1426 of the 72d Congress. H. R. 4398 was laid on the table when a similar bill, which had been introduced in the Senate (S. 1091), was called up and passed in

[1] The United States, out of abundant precaution, is filing a petition for a writ of certiorari in the instant case.

[2] The Committee report does not comment on this change in language. A fair conclusion is that the amendment was regarded to be so plain as to require no comment.

the House. Cong. Rec. 73d Cong., 2d Sess., p. 6585. The bill had been before the Senate Judiciary Committee. It must be assumed that the judiciary committees of both houses were aware of the fact that the language they used authorizing an appeal as of right related to a technical appeal and not to the ordinary review by certiorari. *Cf. Colgate* v. *United States,* 280 U. S. 43, 47. The act as passed therefore must likewise be assumed to confer the right of appeal in the technical sense and not the discretionary review by writ of certiorari which would otherwise obtain.

The following cases are believed to sustain the jurisdiction of the Supreme Court: *Ex parte Atocha,* 17 Wall. 439, 444; *Vigo's Case,* 21 Wall. 648, 651; *Colgate* v. *United States,* 280 U. S. 43, 47.

NATURE OF THE CASE AND THE RULING BELOW

In 1919, the United States, acting through the Chief of Engineers, United States Army, leased to Edward F. Goltra a fleet of tugs and barges to be operated as a common carrier on the Mississippi River and its tributaries. The fleet was delivered to Goltra in July 1922. The contract contained a provision empowering the Chief of Engineers, as lessor, to terminate the contract at any time that, in his judgment, the lessee failed to comply with the terms and conditions of the agreement. Certain dissatisfaction arose as to the manner in which the operation of the enterprise was being conducted. On March 3, 1923, the Secretary of War

advised Goltra that, in his judgment, Goltra had not complied with the terms of the contract and that the contract was canceled. A request for the return of the vessels to the Government was refused. On March 25, 1923, by direction of the Secretary of War, the vessels were seized by certain Army officers. Thereafter, in April 1923, the Chief of Engineers notified Goltra that he had determined that Goltra was in default and that the contract was canceled.

Goltra brought suit against the Secretary of War and other officials of the Army seeking to enjoin the seizure of the vessels. The District Court issued an injunction and ordered the return of the vessels. On appeal, the Circuit Court of Appeals for the Eighth Circuit reversed. The Supreme Court of the United States affirmed on the ground that the contract had been terminated by the Chief of Engineers in accordance with the terms thereof. *Goltra* v. *Weeks*, 271 U. S. 536.[3]

By a private act of Congress, jurisdiction was conferred upon the Court of Claims to hear, determine, and enter judgment upon the claim of Goltra for just compensation for the seizure of the vessels. The United States defended on the ground that the action of the Chief of Engineers, in making a finding that the contract had been breached, was final

[3] Other reported cases relating to the cancellation of the contract and the seizure of the vessels are: *Goltra* v. *Davis*, 29 F. (2d) 257 (C. C. A., 8th), and *Goltra* v. *Inland Waterways*, 49 F. (2d) 497 (App. D. C.).

and not subject to judicial review. The Court of Claims found that the Chief of Engineers did not exercise his independent judgment in terminating the contract, but was coerced into his action by the Secretary of War. It accordingly held that—

> The Secretary of War had no authority under the contract to exercise the right conferred upon the Chief of Engineers and, until the Chief of Engineers had cancelled the contract, the action of the Secretary of War, in cancelling the contract, was *ultra vires,* and the action of the Acting Secretary of War in ordering the seizure of the fleet by Colonel Ashburn was a tortious act. * * *
>
> The plaintiff having been deprived of his lease and option to purchase, illegally and wrongfully, the question arises as to what compensation he shall receive.

It is thus clear that the Court of Claims concluded that the contract was wrongfully terminated, and that the seizure of the vessels was a tortious act and a breach of the Government's obligations under the contract.

The Court of Claims apparently conceiving that the language of the act either authorized or compelled it so to do, awarded interest from the time of the taking, and concluded its opinion with the following language:

> Judgment is entered for the plaintiffs in the sum of $350,000, with interest at 6 per cent per annum, not as interest but as part

of just compensation, from March 25, 1923, to the date of payment. *Virginia Engineering Company* v. *United States,* 89 C. Cls. 457.

On April 1, 1940, it accordingly entered judgment for Goltra in the sum of $350,000 with interest thereon from March 25, 1923, to date of payment. It is to the part of the judgment awarding interest that the United States now specifically excepts.

THE QUESTION IS ONE OF SUBSTANCE.

Section 177 of the Judicial Code, with certain exceptions not here pertinent, prohibits the Court of Claims from allowing interest prior to the entry of judgment except upon a claim based upon a contract expressly stipulating for the payment of interest. It has been consistently held that recovery of interest against the United States cannot be had unless expressly authorized by contract or by special act of Congress. *Boston Sand Co.* v. *United States,* 278 U. S. 41; *Cherokee Nation* v. *United States,* 270 U. S. 477, 487; *District of Columbia* v. *Johnson,* 165 U. S. 330, 338; *United States* v. *North Carolina,* 136 U. S. 211. The rule is strictly applied and courts proceed on the assumption that Congress will clearly specify the allowance of interest if it so intends. *United States* v. *North American Co.,* 253 U. S. 330, 336; *Tilson* v. *United States,* 100 U. S. 43, 46. The rule has been held to be comparable to sovereign immunity to suit and to statutes of limitations. *United States* v. *Verdier,* 164 U. S. 213, 219. Cases involving a taking for public use

have no application. This case did not in any sense involve a taking for public use. The Court of Claims specifically stated that the seizure of the vessels was tortious and that the contract was wrongfully and unlawfully terminated. Even as between private parties, interest would not be allowable in such circumstances.

Moreover, recent decisions of the Court of Claims are conflicting on the question of the allowance of interest where a special act confers jurisdiction to enter judgment upon a claim for just compensation or to award just compensation upon a claim. In *Squaw Island Freight Terminal Co.* v. *United States,* 89 C. Cls. 269, the court refused to allow interest under a special act conferring jurisdiction upon it to render judgment on the claim for just compensation. The language there employed was identical to that used in the present case. In *Virginia Engineering Company* v. *United States,* 89 C. Cls. 457, where the language of the special act provided that the Court of Claims award just compensation and to enter judgment therefor, it allowed interest. The opinion in the instant case makes no effort to reconcile these conflicting decisions, nor does the decision of the Court of Claims in any of the three cases rest upon a distinction in the language employed.

The question as to whether the United States should respond in damages including interest, merely because of the presence of the term "just compensation" in some form in a special act, is one

of substantial importance. The decision in the instant case makes a departure from earlier decisions which hold that interest may not be allowed under special acts unless provided for in clear and express language. It should not be allowed to stand unless expressly approved by the Supreme Court.

There is appended hereto a copy of the special findings of fact, conclusion of law and opinion of the Court of Claims entered April 1, 1940.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

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ACCOMPANYING PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES

In the Court of Claims of the United States

No. 42696

(Decided April 1, 1940)

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED

v.

THE UNITED STATES

Mr. Herman J. Galloway for the plaintiffs. *Messrs. Richard E. Dwight, Frederick W. P. Lorenzen,* and *Dwight, Harris, Koegel & Caskey* were on the briefs.

Mr. Alexander Holtzoff, with whom *Mr. Assistant Attorney General Francis M. Shea,* for the defendant. *Mr. Herbert A. Bergson* was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

SPECIAL FINDINGS OF FACT

1. Edward F. Goltra, the original plaintiff in this suit, at all times herein pertinent, was a citizen

of the United States and a resident of St. Louis, Missouri.

Since the institution of this suit, Edward F. Goltra on April 2, 1939, departed this life, leaving as his executors Kate B. Goltra and E. Field Goltra, Jr., who have been substituted as plaintiffs. Wherever the word "plaintiff" is used herein, reference is made to Edward F. Goltra and not the executors.

2. The petition herein was filed July 21, 1934, pursuant to Private Act approved by the President on April 18, 1934, as follows:

AN ACT

Conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra, against the United States for just compensation to him for certain vessels and unloading apparatus taken,

whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: *Provided,* That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: *Provided further,* That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid.

3. In the year 1917, after this country had entered the World War, traffic conditions in the Mississippi Valley became acute because of the inadequacy of rail transportation facilities, and defendant investigated the feasibility of developing river transportation facilities. Plaintiff, in cooperation with defendant, at his own risk and expense, conducted practical experiments as to the commercial feasibility of transporting coal from St. Louis to St. Paul and iron ore in the reverse direction by means of barges on the Mississippi River, and also conducted an experimental trip carrying knocked down ballast cars on barges from St. Louis to New Orleans to be sent to the armies

of defendant in France. As a result of these experiments the engineers of the Corps of Engineers of the Army obtained information necessary in order to prepare specifications and designs for a fleet of barges for operation on the Mississippi River. Plaintiff reported the results of these experiments to the President of the United States and asked that defendant give financial aid in defraying the cost of building a fleet such as is described in the next finding. Plaintiff offered to take over the vessels when completed, operate them, and reimburse the Government for the cost thereof in any fair manner.

4. Thereafter, as a wartime measure, defendant entered into contracts for the construction of 19 steel barges and planned the construction of 4 steel towboats to tow the barges. The barges and towboats were later built and became the property of defendant.

5. On March 1, 1919, plaintiff sent a letter to the Secretary of War relating to these boats and barges. In that letter he recited facts with respect to his efforts on the Mississippi River in 1917 substantially as stated in Finding 3 and concluded as follows:

> As the whole project will now before long be consummated, I desire to enter into an agreement for the operating and taking over of the whole project. In view of the fact that it has been generally understood that I was to take over the facilities, I have been

preparing myself by acquiring the necessary fuel properties and ore properties and real estate for the terminal facilities, and I feel that I should no longer be left without an agreement reduced to writing covering this matter.

I respectfuliy refer you to your letter of the 25th of October 1917, addressed to Mr. E. N. Hurley, and also your letter of December 13, 1918, addressed to the Emergency Fleet Corporation, and to say in conclusion modestly as I can, that the entire inland waterway traffic matter took on form and substance as the direct result of the work I did on the Mississippi River in the Spring and Summer of 1917, and that the Inland Waterways Commission was an afterthought and result of said activities and was formed long after the moral obligation at least, of turning over these vessels to me was entered into.

6. On May 28, 1919, plaintiff and defendant entered into a contract (hereinafter referred to as the "original contract"), and on May 26, 1921, plaintiff and defendant supplemented the original contract by a contract (hereinafter referred to as the "supplement contract"). Both these contracts were prepared and drafted by the defendant, and were signed by the Chief of Engineers as party of the first part and by the plaintiff as party of the second part. A copy of the original contract is Exhibit B to the petition and a copy of the supplemental contract is Exhibit C to the petition and both are made a part of these findings by reference.

7. At all times herein pertinent and material, there was stationed at St. Louis an officer of the corps of engineers of the United States Army called "District Engineer." Among the functions of this officer was the duty of representing the Chief of Engineers in connection with the performance by the respective parties of the original contract and the supplemental contract and in supervising plaintiff's performance of the contracts.

8. From the year 1920 a fleet of barges and towboats known as the "Mississippi Warrior Service" has been operated in the transportation of freight as a common carrier on the Mississippi River between St. Louis and New Orleans and on the Warrior River. From 1920 to about June 1924 the Mississippi Warrior Service was conducted as one section of a division in the War Department known as the Inland and Coastwise Waterways Service, and from about June 1924 until the present time it has been conducted by Inland Waterways Corporation, a corporation organized under chapter 243 of the Act of Congress of June 3, 1924 (43 Stat. 360, 49 U. S. C. 151–6), the stock of which has at all times been wholly owned by defendant. At all times herein pertinent and material, the Mississippi Warrior Service was permitted by defendant to carry and did carry practically all classes of the more common freight available for transportation on the Mississippi River at rates of 80 percent of the prevailing rail rates.

9. On March 2, 1921, plaintiff sent a letter to the Chief of Engineers as follows:

> I am asked by various river cities to quote a definite rate to them for transportation of commodities by means of the boats and barges being constructed under my government contract. The different municipalities are in the process of installing terminal facilities and find that it is necessary to have definitely set forth by the Secretary of War what rates they may expect.
>
> I respectfully suggest that I be authorized to quote them the same rates as obtained on the Government Barge Line now operating on the lower river, viz—80% of the all-rail rates that now obtain.
>
> Will you be good enough, if you approve of my suggestion, to communicate with the Secretary of War, notifying him of same.

The "Government Barge Line" referred to in this letter was the Mississippi Warrior Service. On March 3, 1921, the Acting Chief of Engineers sent a letter to the Secretary of War which contains the following:

> It is represented by the lessee that it would be advantageous to the operation of the vessels if the rates of transportation should be fixed at 80 percent of the prevailing rail tariffs. These are the rates charged on the government line now operating below St. Louis, and in my opinion it would be in the interest of the shipping public to permit the same rates to be charged on this line. I

> accordingly recommend that the Secretary of War give his consent thereto.

On March 4, 1921, the Secretary of War gave his consent under the original contract to plaintiff's operation of the barges and towboats at rates less than the prevailing rail tariffs, i. e., 80 percent thereof. On or about March 10, 1921, plaintiff received from the office of the Chief of Engineers notification of such consent, and on or about March 14, 1921, he received from the District Engineer a copy of the letter of March 3, 1921, and the Secretary of War's endorsement thereon.

10. In the latter part of March 1922 plaintiff notified the Chief of Engineers that he was exercising his option to purchase the barges, towboats and unloading facilities, that he had appointed an appraiser for that purpose, and that he desired the Chief of Engineers to appoint another appraiser. The Chief of Engineers, April 1, 1922, refused to appoint another appraiser at that time on the ground that the terms of the lease had not yet begun to run.

11. On March 31, 1922, the Secretary of War sent a letter to plaintiff as follows:

> I am told there was recently an interview in the St. Louis Post-Dispatch in which you stated I had authorized you to make rates on the lower Mississippi at eighty percent of the railroad rates. I have not seen the interview so I am not clear that what I have stated is definitely correct. But in any case,

I told you at the time I could not authorize or approve any operation on the lower Mississippi that would enter into competition with the established line of barges. This line is operated for a definite purpose and should not be interfered with in that operation by any action of the Government.

I said if there was freight on the lower Mississippi which could not be handled by the present operating line and it could be transported by your barges, in that case I would authorize a rate of eighty percent of the railroad rate. In making this statement I was assuming that what you told me—that the present line could not handle the material which you mentioned—is a fact; but any rate charged must be agreed to by General Downey and the operators of the present line.

Your contract calls for a rate not less than the railroad rate without the approval of the Secretary of War and I shall give no approval which does not carry out this general statement.

The barge line referred to in this letter was the Mississippi-Warrior Service. At the time when the letter was written, General Downey, referred to therein, was Chief of the Inland and Coastwise Waterways Service. The letter was released to the newspapers prior to the receipt thereof by plaintiff and was quoted in an article which appeared in the St. Louis Post-Dispatch on April 2, 1922, under a Washington date line bearing the date April 1.

12. On April 18, 1922, plaintiff had a meeting with the Secretary of War in Washington and at that time insisted that he had in writing been given the right to operate the barges and towboats at 80 percent of the full rail rates. The Secretary of War denied that plaintiff had a right to operate the barges and towboats at less than the full rail rates and stated that the delivery of the barges and towboats to plaintiff should be postponed until the Secretary of War had obtained legal advice with respect to plaintiff's rights.

13. Before the meeting with the Secretary of War on April 18, 1922, plaintiff went to the office of the Interstate Commerce Commission to arrange for filing certain barge line rates to be effective when the barges and towboats should be delivered to him, and after the meeting with the Secretary of War an official of the Interstate Commerce Commission informed plaintiff that he could not file his rates as long as the Secretary of War asserted the right to control plaintiff's rates.

14. On May 6, 1922, the Secretary of War sent a letter to plaintiff as follows:

> You are hereby notified that under the provisions of paragraph 2 (a) of the certain contract #E7076 between yourself and Major General William M. Black, Chief of Engineers, United States Army, dated May 28, 1919, as supplemented by an amendment thereto dated May 26, 1921, the consent and approval of the Secretary of War heretofore, on the 4th day of March 1921, given to

the operation by you of the vessels covered by and included under the provisions of said contract, at transportation rates equal to 80% of the prevailing rail tariffs, is hereby withdrawn and cancelled as to any and all contracts, agreements or undertakings for transportation on the Mississippi River and its tributaries below the City of Saint Louis, Missouri, hereafter made and entered into by you.

From and after this date you are authorized to operate said vessels on the Mississippi River and its tributaries below the said City of Saint Louis, only at transportation rates equal to and not less than the prevailing rail tariffs, save and except in such cases, and as to such transactions and commodities as the Secretary of War shall, upon application to him, have previously specifically consented to and approved.

On May 25, 1922, the Secretary of War sent a letter to plaintiff, the body of which is in part as follows:

In compliance with the terms of my letter of May 6, 1922, you are hereby authorized to transport the following articles from port to port on the Mississippi River or its tributaries at not less than 80% of the all-rail rates:

Liquids in bulk, including liquid asphalt or road oil, in drums; coal, lumber, sulphur, ties, cement, salt, sand, gravel, crushed rock; and grain over and above the capacity of the Mississippi-Warrior Service to handle such commodity.

Due to the conditions limiting the amount of grain which may be handled through New Orleans, and due to the limited elevator capacity at Cairo and St. Louis, you will be required to obtain from Mr. Theodore Brent, Federal Manager, Mississippi-Warrior River Service, or his representative in St. Louis, Mr. J. P. Higgins, the amount of grain you may carry and specific dates upon which you can carry it.

15. On July 15, 1922, defendant delivered to plaintiff at St. Louis the 19 barges and 4 towboats.

The towboats delivered to the plaintiff were in all respects identical. Each was of the stern-paddle wheel type, equipped with a coal-burning steam engine rated at approximately 2,000 horsepower, was of 300-foot length over all, 58-foot beam and 10-foot depth of hold, and had a draft of approximately 4 feet with a light load of fuel and of approximately 5½ feet with a usual load of fuel.

The barges, when delivered to plaintiff, were in all respects identical and each was of steel construction with a spoon-shaped bow especially designed for easy towing. Each of the barges was of 300-foot length, 48-foot beam, and 10-foot depth of hold, having a draft of approximately 19 inches when light, and a draft of 9 feet with a maximum load of 3,000 tons. Each of the barges had a double bottom and sides which, together with bulkheads, created 22 water- and oil-tight compartments between the outer and inner shells for carrying of all kind of liquid cargoes, including crude

oil and its derivative products; and each of the barges was completely equipped for loading and unloading liquid cargo by means of a 6-inch pipe system. Each of the barges also had an open cargo hold suitable for carrying materials or commodities not requiring protection from the weather. None of the barges was equipped to carry grain or other perishable commodities, but they could have been converted into barges capable of carrying such commodities by the construction of covers, roofs, or cargo boxes thereon. The barges were the most advanced in type of any river barge constructed and up to the present time are the only barges of this type on the Mississippi River.

16. Soon after the delivery of the fleet, it was discovered that the firing mechanism of the towboats was inefficient, and plaintiff, in order to remedy this condition, installed oil-burning equipment on the towboat *Illinois*. This change proved effective.

17. On August 7, 1922, immediately after the oil-burning equipment had been installed on the towboat *Illinois,* plaintiff, with the approval of the District Engineer, caused this towboat and several of the barges to depart from St. Louis for Caseyville, Kentucky, situated on the Ohio River, to carry coal which had been offered to plaintiff for transportation from Caseyville, Kentucky, to the vicinity of St. Louis. The towboat *Illinois* and four of the barges returned to St. Louis on September 9, 1922. On the trip to and from Casey-

ville, the towboat *Illinois* carried a very light load of fuel, and the barges were empty on the way to Caseyville and loaded light to but a small fraction of their capacity on the return trip. The operation of the towboat and barges on the trip to and from Caseyville was interfered with by the very low water, groundings, and delays occasioned by the necessity of waiting for dredges to clear crossing and dredging necessary beneath the coal tipple at Caseyville. During this trip mechanical breakdowns of the towboat *Illinois* occurred and gener. repairs and alterations were made on this towboat.

Experience on the trip to Caseyville and return indicated the necessity or desirability of making certain additions and changes on the towboat *Illinois* for its efficient operation and they were made between September 9, 1922, and September 26, 1922, by plaintiff's employees after the return of this towboat to St. Louis.

On September 26, 1922, plaintiff, with the approval of the District Engineer, caused the towboat *Illinois* and certain of the barges to depart for Hannibal, Missouri, to load a cargo of cement which the district office of the Corps of Engineers of the United States Army at Cincinnati, Ohio, wished to have transported to that point. The towboat *Illinois* and the barges experienced great difficulty on the trip to Hannibal by reason of extremely low water and the barges were loaded with cement at Hannibal to but a small fraction of their capacity. Nevertheless, the towboat and the barges

experienced great difficulty by reason of low water on the trip from Hannibal to East St. Louis, Illinois. At the latter point plaintiff was advised that by reason of low water it would be impossible to navigate on the Ohio River, and the Corps of Engineers at Cincinnati ordered plaintiff to unload the cargo of cement at East St. Louis for shipment by rail to Cincinnati. The towboat *Illinois* also experienced mechanical trouble on this trip, and repairs were made during the trip by plaintiff's employees. The towboat *Illinois* returned to the plaintiff's docks in St. Louis on October 14, 1922.

From October 14, 1922, until the end of November 1922, the towboat *Illinois* was tied up at plaintiff's docks in St. Louis with steam up and crew on board ready to tow any of the barges. While the towboat was so tied up further additions, changes, and repairs which were necessary or desirable for its efficient operation were made by plaintiff's employees.

Plaintiff did not operate the other three towboats during the period from July 15, 1922, to December 1, 1922.

18. About December 1, 1922, the plaintiff, with the approval and consent of the District Engineer, caused the barges and towboats to be placed in winter quarters where plaintiff expected to keep them until navigation could safely be resumed in 1923. For many years prior thereto it was customary at St. Louis to place commercial barges and towboats into winter quarters about December 1st and leave

them there until sometime in March, in order to protect them from damage from ice and other winter elements. During this period it was unsafe to take such vessels out of winter quarters even though the river might be free of ice because of the risk of injury due to sudden changes in the weather.

19. On December 13, 1922, Colonel Ashburn, Chief of the Inland and Coastwise Waterways Service, of which the Mississippi-Warrior Service was a section, sent a letter to plaintiff, as follows:

> On May 25, 1922, you were authorized to carry certain articles on the Mississippi River and its tributaries at not less than 80% of the all rail rates. Amongst them was "grain over and above the capacity of the Mississippi-Warrior Service to handle such commodity."
>
> The Secretary of War now authorizes you to carry any and all grain at not less than 80% of the all-rail rates that you can secure, regardless of the capacity of the Mississippi-Warrior Service to handle such commodity, and without any further action on your part being necessary. Please acknowledge the receipt of this letter.
>
> It is to be hoped that you will cooperate with the Mississippi-Warrior Service in your grain operations to such an extent that neither you nor they will be handicapped by the grouping of a number of barges at New Orleans loaded with grain which cannot be discharged promptly.

A copy of this communication has been sent to the Grain Dealers Association of St. Louis, to Mr. Brent, and to the District Engineer Officer in St. Louis, for their information and guidance.

At the time when this letter was written, Colonel Ashburn and defendant knew that the barges and towboats were in winter quarters from which they could not then be removed without serious danger of injury, and that the barges were not then equipped to carry grain.

20. On January 5, 1923, the Secretary of War sent a memorandum to the Chief of Engineers as follows:

1. I am returning the audit of the accounts of the Goltra Barge Line for the period July 15th–October 15, 1922, with memoranda from the Chief of Inland and Coastwise Waterways Service and from the Judge Advocate General attached thereto for your consideration.

2. According to the view of the Judge Advocate General, we cannot annul the contract at this time with impunity. Suitable instructions should, therefore, be given the District Engineer at St. Louis that all future reports of operation will include the information necessary to clearly establish the right of the Government to take such action in the event of the failure of the lessee to carry out the terms of the contract.

3. You will inform Mr. Goltra that it is the view of the War Department that the

fleet should be operated to the maximum, and failure to operate, if practicable, is a violation of the contract.

On January 16, 1923, the chief legal adviser to the Chief of Engineers submitted a memorandum to the Chief of Engineers, of which a paragraph reads as follows:

> If Mr. Goltra carried all of the freight offered him during the period, or up to the capacity of his barge line, then he has fully complied with the contract, and if he was ready at all times to carry freight of the kind contemplated by the contract which might be offered him, he would then be within the terms of his contract although none or very little might be offered, nor would the contract compel him to operate the fleet if the physical conditions on the river render it impracticable to do so.

On January 19, 1923, the Assistant Chief of Engineers forwarded to the District Engineer a draft of letter to be signed by the District Engineer and delivered to the plaintiff in accordance with the instructions of the Secretary of War. This letter was delivered to plaintiff by the District Engineer on January 29, 1923. The letter reads as follows:

> The Secretary of War has received a number of communications from commercial organizations interested in transportation on the Mississippi River complaining of the inactivity of the fleet of barges and towboats

leased by you from the Government. He has also had under consideration my report of the audit of accounts of the operation of this fleet as made to October 15, 1922. This report, as you are aware, indicates a but limited movement of trade during the past season.

The Secretary is not satisfied that the operation of the fleet has been as adequate and as vigorous as the last contract of May 28, 1919, contemplates and requires.

The Secretary of War has therefore directed that you be informed that it is the view of the Department that during the period when navigation is practicable the fleet should be operated to the maximum and that failure to so operate it will be regarded as a violation of the contract.

21. Prior to the delivery to him of the letter dated January 19, 1923, plaintiff had, on January 15, 1923, sent a letter to the District Engineer requesting that certain dredging be done in the Mississippi River in front of the unloading facilities to enable barges to get into position for loading and unloading. The letter contained the following:

We propose to begin operating the fleet as soon as the season opens, bringing in coal, ore, and other commodities, and I respectfully request that the dipper dredge which has been in this section and is now at work at Commerce, be detailed to do this dredging, in order to put the channel in shape, as soon as it completes the work upon which it is engaged at present.

> While it will only take it a short time to do this work, nevertheless, February will soon be here and over, and we ought to be in position to start the fleet by the first of March, unless ice prevents.

22. While the towboats and barges were in winter quarters, plaintiff's employees were protecting the barges and towboats and were making alterations and repairs on some of them.

23. No representative of defendant ordered plaintiff to take the barges and towboats out of winter quarters. While the towboats and barges were still in winter quarters, the Secretary of War on March 3, 1923, transmitted to Colonel Ashburn, the Chief of the Inland and Coastwise Waterways Service, a letter addressed to plaintiff, with written instructions for the delivery of the letter to plaintiff, the body of which letter is as follows:

> Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier and in other particulars.
>
> I, therefore, declare the said contract and the supplement thereto terminated. You are hereby directed upon the receipt of this

> notice immediately to deliver possession of the said towboats and barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by funds of the United States, to Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service, who will deliver this notice and who is instructed and authorized to receive and receipt for the property herein mentioned.

On the same day when the letter and instructions were transmitted to Ashburn, which was a Saturday, plaintiff was in Washington and Ashburn delivered the letter to plaintiff in Washington during the afternoon of Sunday, March 4, 1923.

24. Prior to the delivery to plaintiff of the letter of March 3, 1923, from the Secretary of War, plaintiff had no notice or knowledge of any intention on the part of the Secretary of War to attempt to terminate the original contract or the supplemental contract, and the Chief of Engineers had not been consulted by the Secretary of War about terminating the contracts and did not know of the action of the Secretary of War in sending the letter until some time after the delivery thereof.

25. On March 8, 1923, plaintiff sent a letter to the Secretary of War, the body of which is as follows:

> On Sunday, March 4, 1923, there was served upon me by Colonel T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service, your letter of March 3, 1923, stat-

ing that in your judgment I had not complied with the terms and conditions of my contract with the Government dated May 28th, 1919, in that I had failed to operate the towboats and barges specified in said contract as a common carrier, and in other particulars; that therefore you declared said contract terminated and directed me to immediately deliver possession of said towboats and barges, and unloading facilities erected pursuant to a supplemental contract, to said Colonel T. Q. Ashburn.

This notice was served upon me while I was in Washington on other business, and without any previous intimation that any step of this kind was contemplated, and I was informed by Colonel Ashburn that I must give an answer to this notice by six o'clock today.

The abruptness of the action attempted to be taken, and the very brief opportunity allowed for any answer on my part, necessarily requires that my reply be brief.

Most respectfully, I decline to comply with your demand. To do so would deprive me, without any notice whatever, or opportunity to be heard, of rights and property lawfully acquired at a very large expenditure by me of time and money. I have in face of most unjust interference and restrictions fully complied with all the terms of my contract, and further, I have complied with every demand or requirement made of me by either you or the Chief of Engineers of the

United States, the lessor named in my contract.

The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has in fact no substantial basis on which to rest. This I believe will be fully demonstrated to you if I am granted a fair and impartial hearing to which as a citizen I am entitled, and which, in fairness and justice I now request.

Plaintiff never received any reply to this letter and was never granted the hearing requested in the letter.

26. Thereafter plaintiff caused the towboat *Illinois* to be prepared to resume operation and plaintiff caused it to have steam up and be ready to leave St. Louis for Caseyville, Kentucky, on Monday morning, March 26, 1923, in order to tow some of the barges from the latter point with a cargo of coal which had there been offered for transportation.

27. On March 22, 1923, the Acting Secretary of War transmitted a memorandum to Ashburn, Chief of the Inland and Coastwise Waterways Service as follows:

1. You are hereby designated as the representative of the United States for the purpose of taking possession of the towboats and barges leased by the United States to Edward E. Goltra under a contract dated May 28th, 1919.

2. You will proceed to St. Louis, Missouri, Fayville, Illinois, and, if necessary, to

Paducah, Kentucky, or elsewhere the said property may be found, and at once take possession of all of the said towboats and barges, or any number thereof that may be found.

3. In taking such possession you are directed not to employ or use any action that will occasion strife, bodily force, or endanger the public peace.

4. If physical resistance be offered to your taking such possession you are further directed to report that fact with all attending circumstances to me at once.

28. On Sunday, March 25, 1923, while plaintiff was in New York, Ashburn, and several men under his command, acting under orders of the Acting Secretary of War, went to the several places where seventeen of the barges and the four towboats lay moored in the possession of plaintiff's employees and took them from the possession of said employees without the consent of plaintiff or his employees for the use and benefit of the United States.

29. The Chief of Engineers did not know of the order of the Acting Secretary of War to Ashburn to seize the barges and towboats contained in the memorandum of March 22, 1923, or of the proposed seizure until after such seizure had occurred.

30. The District Engineer at St. Louis did not know of the order of the Acting Secretary of War to Ashburn to seize the barges and towboats contained in the memorandum of March 22, 1923, or of the proposed seizure until after such seizure had

occurred. On March 26, 1923, the District Engineer, learning about the seizure, pursued the seized vessels down the Mississippi River because he deemed himself officially responsible for the vessels, but upon being shown a letter from the Acting Secretary of War directing Ashburn to seize the barges and towboats he returned to St. Louis.

31. Prior to the seizure of the barges and towboats on March 25, 1923, the Chief of Engineers had not arrived at any judgment or conclusion or rendered any report to anyone to the effect that plaintiff had in any manner failed to perform any of his obligations under the contracts.

32. Commercial operation of barges and towboats of the same general type as plaintiff's in or out of St. Louis did not commence in the year 1923 prior to the seizure of the barges and towboats by Ashburn, and the Mississippi-Warrior Service did not operate any commercial tow in or out of St. Louis in the year 1923 prior to the seizure.

33. At the time of their seizure the barges and towboats were in good condition and repair and contained all of the alterations and repairs which plaintiff had placed thereon since delivery to him by defendant on July 15, 1922.

34. At all times from the delivery of the barges and towboats to plaintiff on July 15, 1922, until the seizure thereof on March 25, 1923, plaintiff, in connection with his operation and maintenance of the barges and towboats as a common carrier, maintained barge line docks with railroad connection

and unloading facilities in St. Louis, offices in St. Louis equipped with telephone service, signs indicating to the public the location of the docks and offices of the Goltra barge line, and stationery indicating the offices of the Goltra barge line, and maintained a staff of employees to perform all services in connection with the operation and maintenance of the barges and towboats.

Plaintiff also held himself out as a common carrier by means of the barges and towboats between points on the Mississippi River and its tributaries of all cargo suitable for transportation by means of barges and towboats, which might be offered to him by anyone and was ready, willing, and able to transport such cargo. During this time plaintiff solicited business and endeavored to get cargo for transportation, and it was well known in the Mississippi Valley that he had the barges and towboats and was seeking business therefor.

35. During the late summer and fall of 1922, and winter of 1922–23, the water in the Mississippi River and its tributaries was lower than it had ever been in recorded history. During that period the low water and peculiar channel conditions caused the grounding of many barges and towboats, including those operated by the Mississippi Warrior Service.

Barges and towboats could only be operated on the Mississippi River above St. Louis and below St. Louis to Cairo and on the Ohio River under great difficulties due to low water, which resulted in

groundings, delay, and damage even with light and unprofitable loads.

There was no possible cargo offered to plaintiff except that hauled by him and referred to in finding 17. From July 15, 1922, to March 25, 1923, plaintiff, as a common carrier, transported by means of the barges and towboats all the cargo offered that the barges were equipped to carry.

36. After Ashburn had seized the barges and towboats, a suit was commenced on plaintiff's behalf in the District Court of the United States for the Eastern District of Missouri against the Secretary of War, Ashburn, and the United States District Attorney at St. Louis, and a bill of complaint was filed therein. In the bill of complaint, plaintiff prayed, among other things, for temporary and permanent injunctive relief looking toward the restoration to him of the towboats and barges and the unloading facilities, and restraining defendants from interfering with plaintiff's possession thereof and an adjudication of plaintiff's rights under the original and supplemental contracts. On the same day, plaintiff was granted a temporary restraining order requiring defendants to restore to plaintiff possession of all of the towboats and barges which had been seized, and requiring defendants to show cause why temporary injunction should not issue.

37. The temporary restraining order and order to show cause, together with the bill of complaint, was served upon Ashburn as he was proceeding

south on the Mississippi River with the towboats and barges which he had seized. Ashburn made a motion to quash said service, which motion was denied and Ashburn was ordered to return the towboats and barges to the jurisdiction of the court at the Port of St. Louis, Missouri. Thereafter, the towboats and barges remained in the custody of defendant until September 1924.

38. On or about April 27, 1923, General Lansing H. Beach, Chief of Engineers, signed a letter which reads as follows:

> WAR DEPARTMENT,
> OFFICE OF THE CHIEF OF ENGINEERS,
> *Washington, April 27, 1923.*
>
> E. F. GOLTRA, ESQ.,
> *La Salle Building, St. Louis, Missouri.*
>
> SIR: Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier.
>
> I, therefore, declare the said contract and the supplement thereto, terminated. You are hereby directed upon the receipt of this notice immediately to deliver possesssion to the United States of the said towboats and

barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by funds of the United States.

Very truly yours,

(Signed) LANSING H. BEACH,
Lansing H. Beach,
Major General, Chief of Engineers.

This letter was signed by General Beach at the direction of the Secretary of War and did not represent the judgment of the Chief of Engineers.

39. On September 4, 1924, after a hearing, Honorable C. B. Faris, United States District Judge, made an order granting temporary injunction which required the defendant forthwith to restore to plaintiff at the Port of St. Louis all of the barges, towboats, and other facilities and appliances seized by defendants, subject to an accounting for damages resulting from the use and possession of the property since the seizure thereof and restraining those defendants from taking any of the property from plaintiff's possession until further order of the court.

40. The order granting the temporary injunction was reversed on appeal on July 23, 1925, by the United States Circuit Court of Appeals for the 8th Circuit in a decision reported in 7 F. (2d) 838, and on June 7, 1926, on writ of certiorari, the Supreme Court of the United States, in a decision reported in 271 U. S. 536, affirmed the decision of the Circuit Court of Appeals. Thereupon, between June 23, 1926, and August 1926, pursuant to and acting upon

the mandate of the Supreme Court, defendant resumed the possession of the towboats, barges, and unloading facilities which had been acquired by defendant on March 25, 1923, but had been interrupted by the temporary injunction of September 4, 1924. Defendant has retained possession of the boats and barges since August 1926, and has caused the same to be operated as a part of the Mississippi Warrior Service.

41. On November 7, 1927, the Judge of the District Court for the Eastern District of Missouri, finally disposed of plaintiff's litigation with the Secretary of War and Ashburn, by granting a motion to dismiss an amended and supplemental bill of complaint. On November 2, 1928, the determination of the District Court was affirmed by the United States Circuit Court of Appeals for the 8th Circuit in a decision reported in 29 F. (2d) 257, and on March 11, 1929, the Supreme Court of the United States, in a decision reported in 279 U. S. 843, denied a petition for writ of certiorari.

42. On or about December 6, 1924, plaintiff again undertook to exercise his option to purchase the fleet, and for that purpose appointed an appraiser, so notifying the Chief of Engineers and requesting him likewise to appoint an appraiser. The Chief of Engineers refused the request, assigning as his reason therefor the seizure of the towboats and barges and the then pending litigation.

43. For the purchase and installation of the oil-burning equipment upon the towboat *Illinois* re-

ferred to in finding 16, plaintiff spent the amount of $6,414.28, which was a reasonable expense therefor, and for which sum plaintiff has never been reimbursed.

44. For desirable or necessary repairs to and replacement of defective feed pumps on the towboat *Illinois,* plaintiff spent the amount of $1,027.23, and for other desirable or necessary additions, changes, and repairs on the towboat *Illinois,* plaintiff spent the amount of $732.11. These expenditures were reasonable and plaintiff has never been reimbursed therefor.

45. For installation of powdered coal-burning equipment on the towboat *Minnesota,* which installation was desirable, plaintiff spent the amount of $7,140.89, which was a reasonable expense therefor and for which sum plaintiff has never been reimbursed.

46. At the time of the seizure of the barges and towboats on March 25, 1923, there were on the towboat *Illinois,* fuel oil and other supplies belonging to plaintiff for which plaintiff had paid, and the reasonable value of which was $5,038.44. No part of the supplies was returned to plaintiff, and he has never been reimbursed therefor.

47. When the barges and towboats were returned to plaintiff in September 1924, under the order of the United States District Court, they were damaged and in need of many repairs other than ordinary current repairs, and many parts were missing from some of the towboats. None of these condi-

tions existed when the barges and towboats were seized. By reason of these conditions, plaintiff spent for repairs and replacements the amount of $79,474.52, which was a reasonable expense therefor and for which sum he has never been reimbursed.

48. For insurance which plaintiff was required by Section 2 (b) of the original contract to procure, he spent the amount of $21,017.73 for the period from July 15, 1922, to March 25, 1923, and the amount of $30,830.30 for the period from September 1924 to July 1926, which amounts were a reasonable expense for insurance and for which plaintiff has never been reimbursed.

49. During both periods that plaintiff was in possession of the towboats and barges he operated at a loss.

50. Pursuant to the supplemental contract, plaintiff provided, in the year 1921, at his own expense, the tract of land (hereinafter referred to as the land provided by plaintiff), and concrete runways located on part thereof, on which the unloading facilities referred to in the supplemental contract were to be erected and were to stand and operate; the remainder of the concrete runways was located on the land of the Mississippi Valley Iron Company by permission of that company procured by plaintiff, and with the consent of the District Engineer to such arrangement. The land provided by plaintiff was accreted and was located in the City of St. Louis and extended from the Mississippi River on the east to the right-of-way

of the St. Louis & Iron Mountain Railroad Company (Missouri Pacific), on the west, and was directly east of the 6500 South Broadway Block in the City of St. Louis. Plaintiff caused the runways to be built at his own expense according to plans submitted by plaintiff to and approved by the District Engineer. Defendant caused the unloading facilities referred to in the supplemental contract to be erected on the concrete runways. The unloading facilities consisted of a steel travelling crane which moved along the runways. The travelling crane was a substantial structure, of great height and length and was so equipped that the bucket of the crane, having a 10-ton capacity, could be lowered over the water into the holds of barges tied to the bank of the Mississippi River alongside said tract of land, and remove cargo from the barges and deposit the same in railroad cars or other means of transportation.

The construction of the concrete runways cost plaintiff the amount of $36,061.49, which was a reasonable cost therefor and for which plaintiff has never been reimbursed.

51. For the entire periods that plaintiff was in possession of the fleet the reasonable rental value of the land provided by him for runways and loading facilities was $6,000.00.

52. On February 13, 1930, plaintiff sent a letter to the Secretary of War as follows:

> In connection with my claim against the United States and/or the Inland Waterways

> Corporation, arising out of the occupation of real estate owned by me in South St. Louis, Missouri, by unloading facilities erected thereon by the United States Government under the provisions of the supplemental contract between the Chief of Engineers and myself, dated May 26, 1921, I beg to advise that if the United States and/or the Inland Waterways Corporation will immediately release and convey to me the said unloading apparatus and will immediately vacate and deliver to me possession of my property upon which said apparatus is located, I will release the Government from any and all claims accruing to me account of the aforesaid supplemental contract, save only my claims for use of my property, the expense of the caretakers (Watchmen), and accrued interest on these said claims, all up to the date of the aforesaid conveyance and notice of release to me of my property.

Defendant refused to take further action upon these claims in connection with the unloading facilities and the land provided by plaintiff because of the pendency of litigation between plaintiff and Inland Waterways Corporation involving the supplemental contract. On August 13, 1930, the Acting Secretary of War sent a letter to plaintiff, the body of which is as follows:

> Referring to the conversations and correspondence heretofore had relative to an unloading apparatus erected upon lands owned by you at St. Louis, Missouri, under

> the provisions of a supplemental contract dated May 26, 1921, and subsequently terminated, you are advised that the United States claims no right, title, or interest whatsoever in the said unloading apparatus, or in the real estate upon which it is situated, and waives whatever right, title, or interest it may be thought to have in the same.

On August 21, 1930, the plaintiff sent a letter to the Chief of Engineers, as follows:

> Herewith copy of a communication received by me from Acting Secretary of War F. H. Payne.
>
> Will you kindly advise me whether or not I am to understand that you, in your capacity as one of the parties to the supplemental contract referred to in Mr. Payne's herewith attached communication, concur in same and do now notify me you have no further use for my property and your leasing privilege under same is now by your free act positively terminated.

On August 28, 1930, the Chief of Engineers sent a letter to plaintiff, the body of which is as follows:

> 1. Reference is made to your letter of the 21st instant regarding the unloading apparatus erected on your property at St. Louis, Mo., pursuant to a certain supplemental contract dated May 26, 1921.
>
> 2. In reply you are advised that the Chief of Engineers concurs in the letter addressed to you under date of August 13, 1930, in which you were advised that the "United

States claims no right, title, or interest whatsoever in the said unloading apparatus, or in the real estate upon which it is situated, and waives whatever right, title, or interest it may be thought to have in the same."

53. At all times the salvage value of the concrete runways was less than the cost of removing them.

COUNTERCLAIMS

54. In September 1925, the defendant sold and delivered to the plaintiff 3,568.8 barrels of fuel oil, the reasonable value of which was $1.35 per barrel, or a total of $4,817.88, for which the plaintiff has not paid anything to the defendant. No demand for payment of this sum was made before the filing by the defendant of its first counterclaim in this cause.

55. On or about June 15, 1928, the plaintiff filed with the Collector of Internal Revenue at St. Louis, Missouri, his income-tax return for the year 1927, showing a net loss for the year and no tax due, whereas in fact the plaintiff had a net income for said year subject to income tax, amounting to $38,696.70, and the tax thereon amounted to the sum of $1,697.92, which the plaintiff failed to pay and for which he is indebted to the defendant with interest thereon. On or about December 7, 1931, plaintiff executed and filed with the Commissioner of Internal Revenue a consent that an assessment of income tax due from the plaintiff for the year 1927 might be made by said Commissioner on or before December 31, 1932, except that if a notice

of deficiency in tax was sent to the taxpayer on or before that date, the time for making assessments should be extended beyond that date by the number of days during which the Commissioner was prohibited from making an additional assessment, and for sixty days thereafter.

On or about December 29, 1932, a notice of deficiency for the year 1927 in the amount of $1,697.92 was mailed by the Commissioner of Internal Revenue to the plaintiff. On or about March 18, 1933, within the time extended by the said consent of December 7, 1931, the Commissioner of Internal Revenue assessed as the tax of the plaintiff for the year 1927 the sum of $1,697.92, together with interest thereon in amount of $510.21, aggregating the sum of $2,208.13. Notice of the assessment was given to the plaintiff, and demand for payment was made by the Collector of Internal Revenue on or about March 22, 1933; and on April 11, 1933, the Collector granted an extension of time for the payment of this amount to March 1, 1934. Said amount has not been paid by the plaintiff.

On March 14, 1930, plaintiff filed with the Collector of Internal Revenue of St. Louis, Missouri, a tentative income-tax return for the year 1929, disclosing no net income and no tax due, whereas, in fact, for the year 1929 the plaintiff had a net income subject to income tax in the sum of $22,954.25, and the tax thereon amounted to the sum of $377.26. The time for filing the return for the year 1929 was extended by the Collector to

April 15, 1930, but plaintiff has filed no further return for that year.

On or about February 7, 1932, the Commissioner of Internal Revenue mailed to plaintiff a notice of the tax determination for the year 1929. On or about April 27, 1934, the Commissioner of Internal Revenue assessed the tax against plaintiff for the year 1929 in the amount of $377.26, together with a penalty of $94.32 for failure to file a return as required by law. and interest on said tax of $93.17. Notice of said assessment was given and demand for payment was made by the Collector of Internal Revenue on April 30, 1934, but said amount has not been paid by the plaintiff.

For the year 1930 plaintiff filed no income-tax return, whereas, in fact, he had a net income subject to income surtax in the sum of $11,631.49, and the tax thereon amounted to the sum of $16.31, of which the sum of $8.00 had been paid at the source, leaving a balance of $8.31 due and owing. On February 7, 1934, the Commissioner of Internal Revenue mailed to the plaintiff a notice of the tax determination for the year 1930. On or about April 27, 1934, the Commissioner of Internal Revenue assessed a tax for the year 1930 in amount of $8.31, together with a penalty of $2.08 for failing to file a return and interest on the tax of $1.55. Notice of assessment was given and demand for payment thereof was made by the Collector of Internal Revenue on or about April 30, 1934, but said amount has not been paid by the plaintiff.

The total of the above taxes with interest and penalties is $2,784.82.

56. The counterclaims being valid are allowable.

Taking the amount of the counterclaims and all the relevant facts and circumstances, including the expenses of plaintiff, into consideration, the value for the lease, option to purchase, and all legal and equitable claims as of March 25, 1923, is $350,000.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the defendant is entitled to recover on the counterclaims and the plaintiffs are entitled to recover, after deduction of the counterclaims, the sum of $350,000.00, with interest at six percent per annum from March 25, 1923, to the date of payment, not as interest but as a part of just compensation.

It is therefore ordered and adjudged that plaintiffs recover of and from the United States the sum of three hundred fifty thousand dollars ($350,000) with interest at six percent per annum, from March 25, 1923, to the date of payment.

OPINION

WHALEY, Chief Justice, delivered the opinion of the court:

Before this suit was argued and submitted to the court, Edward F. Goltra departed this life on April 2, 1939, and his qualified executors were sub-

stituted as plaintiffs. Wherever the word "plaintiff" is used in this opinion, reference is made to Edward F. Goltra and not to the substituted plaintiffs.

This case was brought to the court under a special jurisdictional act, 48 Stat. 1322, which reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: * * *

It will be seen that this act not only waives the statute of limitations but orders the court to hear, consider, and render judgment notwithstanding any previous court decisions and to give just compensation for the claims of plaintiff for the taking of certain vessels and unloading apparatus under orders of the Acting Secretary of War, whether

the taking was tortious or not, and for any other legal or equitable claims arising out of the transactions.

When this bill was before the Committees of Congress, the Committees gave full consideration to the decision of the Supreme Court in the case of *Goltra* v. *Weeks,* 271 U. S. 536. This case involved an injunction and the Committees were aware that the merits of the case had never been considered by the court. The Committees also had before them a letter from the Attorney General urging the passage of the bill so that the plaintiff could have his day in court on the merits of the case. The real question involved was whether the cancellation of plaintiff's two contracts by the Secretary of War on March 3, 1923, followed by the seizure of the fleet on March 25, 1923, under orders of the Acting Secretary of War, was within the terms of the contracts between the plaintiff and the defendant. The Court held that the "lessor" mentioned in the contract meant the Chief of Engineers and not the Secretary of War.

On May 28, 1919, plaintiff entered into a contract with William M. Black, Major General, Chief of Engineers, U. S. Army, whereby the barges and towboats still under construction were leased to the plaintiff for a term of five years after delivery of the first unit, with an option to plaintiff to purchase the fleet and pay therefor in instalments over a period of fifteen years from the exercise of the option; the rental consisted of all net earnings

made by the fleet and was to be credited on account of the purchase price of the fleet. As part of the transaction plaintiff released the United States from all claims which he had against them as a result of certain engagements made for World War purposes.

On May 26, 1921, a supplemental agreement was entered into between the parties by which the plaintiff agreed to furnish, subject to the defendant's approval, a certain tract of land and runway on which unloading facilities furnished by the lessor were to be erected. The unloading facilities were furnished by the lessor and erected on the land after the runways had been provided by the plaintiff.

On July 15, 1922, the defendant delivered the 19 barges and 4 towboats.

From the time of the delivery of the barges and towboats to the plaintiff, they were operated by the plaintiff as a common carrier until December 1, 1922, when they were placed in winter quarters with the approval and consent of the District Engineer, acting for and as the representative of the Chief of Engineers. It was understood that the fleet was to remain in winter quarters until navigation could be safely resumed in the spring of 1923. During the time that plaintiff had possession of the fleet it was operated to the best advantage by him and plaintiff, as a common carrier, transported all the cargo offered that the barges were equipped to carry. There was no complaint or protest by the

lessor of the operation of the fleet or the failure to accept cargo by the defendant.

On March 3, 1923, the Secretary of War transmitted to Colonel Ashburn, who was one of the officials of the Mississippi Warrior Service, which was a fleet of barges and towboats owned by the Government and operated on the Mississippi River, a letter addressed to plaintiff in which the Secretary of War stated that, pursuant to the right under paragraph eight of the original contract and the supplemental contract, in his judgment, the plaintiff had not operated the barges and towboats under the terms and conditions of the contract and had failed to operate them as a common carrier and declared the contract and the supplemental contract to be terminated. He requested the plaintiff to deliver the fleet and the unloading facilities to Colonel Ashburn. This letter was delivered by Colonel Ashburn to the plaintiff in Washington, D. C., during the afternoon of Sunday, March 4, 1923.

On March 8, 1923, plaintiff declined to comply with the demands of the Secretary of War complaining of the unjust interferences and restrictions which had been interposed and asserted that he had complied with every demand and requirement of the Chief of Engineers who was the lessor named in the contract.

On March 22, 1923, the Acting Secretary of War authorized Colonel Ashburn, as a representative of the United States, to take possession at once of

all of the barges and towboats or any number that could be found. Colonel Ashburn, acting upon the above order went to St. Louis on March 25, 1923, and while plaintiff was absent took the fleet from the possession of the fleet's employees without their consent for the use and benefit of the United States. The nature of the seizure is best described by the United States District Engineer who wired the Chief of Engineers as follows:

> Col. Ashburn with the Federal Barge Line towboat *Vicksburg* and about forty men arrived at Goltra fleet yesterday Sunday morning about eleven overawed Goltra's men and towed four boats and one barge down river about six miles Stop Vicksburg left them on Illinois side, came back to St. Louis, placed four Goltra barges at Barge Line Terminal and went down river with all other Goltra barges wintered at this city * * *.

After the seizure a suit was commenced in plaintiff's behalf in the District Court of the United States against the Secretary of War, Colonel Ashburn, and the United States District Attorney. A temporary order was obtained and the barges were returned to the jurisdiction of the court and brought to St. Louis but they remained in the custody of the defendant until September 4, 1924.

After the hearing on the application for the injunction, the District Judge granted plaintiff's request and ordered the barges returned to him. At this trial a letter from the Chief of Engineers cancelling the contract was presented for the consid-

eration of the court on behalf of the defendant. This letter is dated April 27, 1923, several months after the cancellation of the contract by the Secretary of War and more than a month after the seizure of the fleet by the acting Secretary of War.

The case was appealed to the Circuit Court which reversed the District Judge and the case was then taken to the Supreme Court of the United States.

On June 7, 1926, the Supreme Court affirmed the decision of the Circuit Court and the fleet was delivered to the defendant during June and September of that year. In its decision the Supreme Court held (271 U. S. 536, 548, 550):

> Nor does the circumstance that, as in this case, the lessor whose judgment is to prevail is a party to the contract alter the legal result. Of course the Chief Engineer is not the real party in interest. He is a professional expert, as such was designated as lessor, and is really acting only as an agent for the Government. * * *
>
> * * * The right of the lessor to take over the fleet under § 8 of the contract, unless there was fraud in the judgment of termination by the Chief of Engineers, the lessor, of which we have found no evidence, is clear. We think, therefore, the injunction should be dissolved and the fleet restored to the lessor.

It will be seen that the decision of the Supreme Court was based on the assumption that the Chief of Engineers had exercised his judgment in a fair

and impartial way and terminated the contract.

In the trial of the instant case it is shown that the Chief of Engineers did not exercise his own judgment but was coerced, after the Acting Secretary of War had seized the fleet, in signing the order cancelling the contract.

The evidence is clear and convincing that the Chief of Engineers believed the plaintiff had performed his part of the contract and that there was no cause or reason which would justify him in cancelling the contract. He testified that he did not exercise his own judgment but that, when the letter was presented to him for his signature, he was forced to sign.

It is apparent from the record that the Chief of Engineers did not exercise his judgment in cancelling the lease before the cancellation of the contract by the Secretary of War and the subsequent seizure of the fleet by the Acting Secretary of War.

The cases are too numerous for citation that the plaintiff was entitled to an uninfluenced decision by the Chief of Engineers and that he alone could act.

The Secretary of War had no authority under the contract to exercise the right conferred upon the Chief of Engineers and, until the Chief of Engineers had cancelled the contract, the action of the Secretary of War, in cancelling the contract, was *ultra vires,* and the action of the Acting Secretary of War in ordering the seizure of the fleet by Colonel Ashburn was a tortious act. *Burton*

Coal Co. v. *United States,* 60 C. Cls. 294, affirmed 273 U. S. 337; *Williams Eng. & Cont. Co.* v. *United States,* 55 C. Cls. 349; *Michael H. King* v. *United States,* 37 C. Cls. 428; *Sun Shipbuilding Co.* v. *United States,* 76 C. Cls. 154; *Helvetia Milk Condensing Co.* v. *United States,* 74 C. Cls. 142 and *Lutz Co.* v. *United States,* 76 C. Cls. 405.

The plaintiff having been deprived of his lease and option to purchase, illegally and wrongfully, the question arises as to what compensation he shall receive.

Plaintiff only had a contract for a lease of the fleet for five years with an option to purchase. He attempted to exercise the option to purchase but the defendant refused to comply with the provision of the contract with reference to the appointment of arbitrators to fix the value which should be paid.

During the operation of the fleet from July 1922, to December 1, 1922, the plaintiff sustained a loss. This was a new service and large expenditures had to be made for prospective business, for providing land and runways, for costs incurred for advertising the service, insurance, and for repairs and changes in the towboats. Plaintiff was prohibited from charging less than the rail rate. The loss can be well understood.

It is contended by the plaintiff that, in arriving at just compensation, an offer to rent the fleet made years after the fleet had been seized and the rental value of similar vessels on the Mississippi River

should be taken into consideration. These contentions cannot be sustained. *Sharp* v. *United States*, 191 U. S. 341, 348, 349; *Clarke* v. *Hot Springs Electric Light & Power Co.*, 55 Fed. (2d) 612; and *Sommers* v. *Commissioner of Internal Revenue*, 63 Fed. (2d) 551.

There were no other towboats and barges on the Mississippi River at that time which could have been rented. There was no market value for the lease and option to purchase. Reproduction less depreciation or cost less depreciation are not fair bases on which to place valuation. Plaintiff is entitled to have taken into consideration what he spent in inaugurating the service and the cost of repairs and changes made to the towboats and the supplies furnished by him. Prospective profits cannot be considered. No profits were made by the plaintiff during the time he had possession of the fleet from September 1924 to July 1926. This was primarily due to the fact that all shippers on the Mississippi River realized that the fleet was tied up in litigation and possession was being sought through the courts by the defendant.

As was said by Justice Butler in *Standard Oil Co.* v. *So. Pacific Co.*, 268 U. S. 146, 156:

> It is to be borne in mind that value is the thing to be found and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide. The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but

> there must be a reasonable judgment having its basis in a proper consideration of all relevant facts.

As the plaintiff only possessed a lease with an option to purchase and there being no market value, it is necessary for the Court, in arriving at an amount sufficient to compensate him for injuries sustained, to take into consideration all outlays made by him including the rental value of his land, and make reasonable deduction for the less time engaged and for release from care, trouble, risk, and responsibility attending a full execution of the contract. *United States* v. *Speed,* 75 U. S. 77.

In *Hetzel* v. *Baltimore & Ohio Railroad Co.,* 169 U. S. 26, 37, 38, 39, the court said:

> * * * in such inquiries, absolute certainty as to the damages sustained is in many cases impossible. All that the law requires is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the injury for which suit is brought. This is the rule which obtains in civil actions for damages. They have their foundation in the idea of just compensation for wrongs done.

The court quoted with approval from *Baker* v. *Drake,* 53 N. Y. 211, 220, as follows:

> The proof may sometimes be rather difficult upon the question whether the damage was the just or proximate result of the breach of the covenant. In such case it does

> not come with very good grace from the defendant to insist upon the most specific and certain proof as to the cause and the amount of the damage when he has himself been guilty of a most inexcusable violation of the covenants which were inserted for the very purpose of preventing the result which has come about.

In *Hoffer Oil Corporation* v. *Carpenter*, 34 Fed. (2d) 589, 592, the court said:

> A person who has violated his contract will not be permitted to reap advantage from his own wrong by insisting upon proof which, by reason of his breach, cannot be furnished. * * *
>
> A party, who has broken his contract, will not be permitted to escape liability because of the lack of a perfect measure of the damages caused by his breach. * * *
>
> A reasonable basis for computation, and the best evidence which is obtainable under the circumstances of the case and which will enable the jury to arrive at an approximate estimate of the loss, is sufficient.

See *Eastman Kodak Co. of New York* v. *Southern Photo Materials Company*, 273 U. S. 359.

Taking all the relevant facts into consideration and after allowing the counterclaims, in making a jury award, the Court concludes that the sum of $350,000.00 is just compensation for the vessels and unloading apparatus and all other claims, legal or equitable, arising out of the transactions.

Judgment is entered for the plaintiffs in the sum of $350,000.00, with interest at six percent per annum, not as interest but as a part of just compensation, from March 25, 1923, to the date of payment. *Virginia Engineering Company* v. *United States*, 89 C. Cls. 457.

It is so ordered.

[illegible]ETON, *Judge;* and GREEN, *Judge;* concur.

WHITAKER, *Judge;* and WILLIAMS, *Judge,* took no part in the decision of this case.

A true copy.

Test:

Chief Clerk, Court of Claims
of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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